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No. 86-2035

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE CHESAPEAKE & OHIO RAILRWAY COMPANY
SUCCESSOR IN INTEREST TO THE
BALTIMORE & OHIO RAILROAD COMPANY
Petitioner

v.

GEORGE O. ALDRIDGE and
DAISEY M. ALDRIDGE,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it was reversible error, under the circumstances of this case, for the District Court to refuse to instruct the jury to reduce an award for lost future earnings to present value.

II. Whether there was sufficient evidence to support the verdict of the jury which found that the negligence of the B & O caused or contributed to the plaintiff's injuries.

PARTIES TO THE PROCEEDING

George O. Aldridge ("Aldridge") and Daisy M. Aldridge were plaintiffs and appellees in the proceedings in the U.S. District Court for the District of Maryland and The United States Court of Appeals for the Fourth Circuit, respectively.

The Baltimore & Ohio Railroad Company ("B&O") was the defendant and appellant in the proceedings below, and petitions for grant of a writ of certiorari seeking review of the verdict and judgment of the U.S. District Court, and the opinion of the U.S. Court of Appeals for the Fourth Circuit, en banc.

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OPINIONS BELOW

The decision of the United States District Court for the District of Maryland is unreported. (App. 76a-96a). The March 25, 1987, opinion of the United States Court of Appeals for the Fourth Circuit, on rehearing, en banc, is reported at 814 F.2d 157 (4th Cir. 1987). (App. 47a-75a). The vacated decision of the three judge panel of the United States Court of Appeals for the Fourth Circuit is reported at 789 F.2d 1061. (App. 1a-46a) The text of these opinions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

This case arose on June 19, 1981, when Aldridge filed suit in The United States District Court for the

District of Maryland under the Federal Employers' Liability Act (45 U.S.C.A. Section 51 et seq.), against the B&O, and by Aldridge and his Wife, Daisey M. Aldridge under the common law of Maryland for negligence against Keith D. Brelsford, for injuries sustained on September 9, 1978, when Aldridge, working in the course of his employment as a crossing watchman for the B&O, was struck by Brelsford's motor vehicle. It was established at trial that Aldridge was working his regular tour of duty at the Baltimore Street crossing in Cumberland, Maryland on September 9, 1978, at approximately 2:00a.m., when, a B&O engine in the process of switching cars, stopped on the crossing with the locomotive blocking one-half to

three-fourths of the crossing. Aldridge manually operated the traffic lights to a red position for motor vehicular traffic and had taken his red and white lanterns to the crossing in order to prevent motor vehicular traffic from entering as the train approached the crossing, where it had often stopped in the past. The deisel locomotive continuously blocked the crossing, after stopping, for a period of approximately fifteen to twenty minutes. The bell of the locomotive was not ringing during the time while it was stopped on the crossing, which is significant in that the bell on the locomotive is there to give a warning as to whether the train is going to move. Rule 30 of the Chessie System Operating Rules effective

April 27, 1969, reads as follows:

> "The engine bell must be rung when an engine is about to move, except after momentary stops and continuous switching movements. It must be rung while approaching and passing public crossing at grade and stations and tunnels." It happened frequently that the crossing was fully blocked, but it was unsual for the crossing to be partially blocked as it was this day. Sometimes cars did cross in front of the trains when the crossing was partially blocked. The usual practice of the railroad prior to this date was that the engine would not block only a portion of the crossing, but would block the entire crossing or that the crew would cut the train and pull it over the crossing so as to open up the intersection for motor vehicular traffic.

While the deisel locomotive was blocking the crossing, an automobile,

driven by Brelsford, who was apparently intoxicated, stopped on the west side of the track where the locomotive had the crossing blocked in the wee hours of the morning, and, after being stopped for at least ten minutes, and demanding to be allowed to come across, the driver lost his patience, hollered that he was coming across, revved the motor up and came across the opening of the crossing, striking Aldridge with his motor vehicle. The driver left the scene of the accident and did not come back to render aid. After the incident, Aldridge was taken to Memorial Hospital by ambulance, where he was x-rayed and released. He received medical attention, including therapy and traction, and was authorized to return

to work the later part of November, 1978, but did not do so until the later part of December (which period he took as vacation after he was released to return to work). Aldridge then worked until January 2, 1981, losing some days periodically because of pain in his neck and he finally stopped working on January 3, 1981, because he could not stand the pain any longer.

Trial began on August 8, 1983, and default judgments were entered in favor of the Aldridge's against Brelsford, and in favor of the B&O as cross-claimant. The railroad moved for a directed verdict in the FELA action asserting that no evidence of its negligence had been adduced by Aldridge, who had failed to establish any past

similar incidents. The B&O's motion was denied.

Neither the Plaintiffs nor the Defendant presented any evidence as to the reduction to present value of Aldridge's claimed future lost wages, nor was any evidence presented on the issue of the effects of inflation on such an award. An objective reading of the trial transcript fails to reveal any coherent or clear request on the part of the Defendant, B&O, for an instruction that any award for future wage loss must be reduced to present worth. The trial judge, however, in his post-trial memorandum, indicated that he understood such a request to have been made. No proposed instruction was presented to the trial judge by the Defendant, B&O,

and the jury's verdict, in the amount of $196,800.00 apparently included Aldridge's entire lost future earnings. No objection was lodged by B&O with regard to the failure of the trial court to instruct the jury concerning reduction to present worth of an award of future loss earnings. The B&O's October 21, 1983 post-judgment motions for judgment notwithstanding the verdict and new trial were denied by Order dated January 10, 1984 (App. 76a-78a), and Memorandum Opinion dated April 25, 1984 (App. 79a-96a).

On May 15, 1984, the B&O filed a timely amended Notice of Appeal of the decision to the United States Court of Appeals for the Fourth Circuit, resulting in affirmance on May 1, 1986.

On May 14, 1986, the B&O petitioned the Fourth Circuit for rehearing with a suggestion for rehearing en banc. The petition was granted by Order dated June 24, 1986, vacating the panel decision and expressing the court's interest in the filing by the parties of supplemental briefs concerning the "issue of liability and the issue of whether the District Court erred in not requiring the Plaintiff to prove the present value of future earnings."

On rehearing, the en banc Court of Appeals affirmed "the District Court's ruling that the jury's findings of negligence on the part of the railroad was sufficiently supported by

the evidence" and affirmed "the District Court's refusal to instruct the jury to reduce Aldridge's damages to present value" in an Opinion dated March 25, 1987 (App. 47a-75a).

ARGUMENT

I. THE FAILURE OF THE DISTRICT COURT TO INSTRUCT THE JURY WITH REGARD TO THE REDUCTION TO PRESENT VALUE OF AN AWARD OF FUTURE LOST EARNINGS, IF ERRONEOUS, WAS HARMLESS WHERE: (1) NO EVIDENCE ON THE ISSUE WAS PRESENTED TO THE JURY, (2) NO COHERENT OR CLEAR REQUEST FOR SUCH AN INSTRUCTION WAS MADE (3) NO SUCH PROPOSED INSTRUCTION WAS PRESENTED TO THE TRIAL COURT AND (4) NO OBJECTION WAS RAISED TO THE LACK OF SUCH INSTRUCTION.

The circumstances of this case simply do not warrant the grant of a

Writ of Certiorari to petitioner. Neither the injured employee, George O. Aldridge, nor the Baltimore and Ohio Railroad presented any evidence at trial regarding the positive effects upon a jury's award of inflation, or the negative effects upon such an award of discounting in accordance with current available interest rates. As a reading of the trial transcript would reveal, the B&O never made any objective, recognizable request for an instruction to the effect that the jury must reduce any future wage loss to present value (nor did the B&O ask for an instruction regarding the effect of income tax upon the jury's award). With no evidence before the jury with regard to the issue of present worth, the trial court

clearly made an overt and deliberate choice in the presence of counsel, and without any objection by counsel, to utilize the "total offset" concept of present worth which the Ninth Circuit Court of Appeals had adopted in Alma v. Manufacturer's Hanover Trust Co., 684 F.2d 622 (9th Cir. 1982). The District Court necessarily had to, in an equitable manner, rationalize and weigh the competing interests and principles of law in making its decision, much of which it explained in its memorandum opinion in ruling against the B&O's motion for new trial on this precise issue (App. 79a-96a). Thus with no evidence before the jury regarding how to reduce an award to present worth, or the effects of inflation upon such an

award and fully aware of both the dictates of Chesapeake and Ohio Ry. Co. v. Kelly, 241 U.S. 485 (1916), and of the fact that "without some evidence of the correct factors to be considered, instructing the jury that they may adjust damages can only serve to confuse, with little hope of leading it to the correct result" (App. 94a), the trial court determined that "the total offset" approach to the problem, in this case, made "excellent sense" (App. 93a).

Appellant's brief utilizes overbroad and expansive language in characterizing the legal principles and cases involved in its discussion of this issue. Neither Kelly, supra, nor St. Louis S.W. Ry. v. Dickerson, 470 U.S. 409 (1985) employ the imperative terms

"shall" or "must" in stating that an award should (Dickerson) or ought to be (Kelly) made up on the basis of their present worth. Thus, although the present worth concept is proper and appropriate where an award for future lost earnings is concerned, it apparently is not absolutely mandatory under all circumstances including the circumstances of this case.

The Fourth Circuit en banc embraced the logic of the panel majority opinion, which accepted as reasonable, under the circumstances of this case, the utilization by the District Court of the Alma total offset approach to present worth. Appellant claims that Alma has been effectively overruled by two subsequent Supreme Court opinions,

citing Jones & Laughlin Steel Corp. v. Pfeiffer, 462 U.S. 523 (1983) and St. Louis S.W. Ry. Co. v. Dickerson, 470 U.S. 409 (1985). Neither of these cases overrules the Alma decision or rejects the Alma total offset approach to present worth. In Pfeiffer, this Court overruled the Third Circuit Court of Appeals and stated that the use of the total offset approach is not mandatory in the Federal Courts. The Court, additionally, declined to select any one method for determining the present value of a future wage loss and concluded that no matter what method or rate the trial court ". . . may use to discount the estimated stream of future earnings, it must make a deliberate choice, . . ." 462 U.S. at 552-53.

That each of the United States Judicial Circuits has not chosen to impose an identical method upon litigants does not, despite petitioner's assertions, create confusion, doubt, and absolute havoc among the circuits; nor is there any apparent basis for petitioner's other assumption that wasteful forum shopping is promoted through the lack of a single mandatory and uniform rule. The circuits have responded to Pfeiffer, generally, by permitting the trial court to choose some method of discounting, and some circuits have imposed some single method upon the trial courts as mandatory. This has all been accomplished in accord with the dictates of Pfeiffer.

Both the three judge panel

opinion (App. 1a-46a) and the Opinion of the Fourth Circuit, en banc, (App. 47a-75a) approved of the adoption by the trial court, under these rather unique circumstances, of the Alma approach. Alma's requirement that the defendant, go forward with the production of evidence regarding an appropriate discount rate does not shift plaintiff's burden of proof to defendant, but merely, shifts the burden of going forward with evidence on the issue to the defendant. This is no more burdensome than requiring that a defendant produce evidence with regard to any other offset to which may be entitled.

The multiplicity of approaches taken by the Circuit Courts in the

aftermath of Pfeiffer do not in the least cloud every federal action to recover future losses as petitioner asserts. Entitlement to a jury instruction is based upon evidence on the issue being introduced at trial. See, Federal Rule of Civil Procedure 51. Where no evidence exists on an issue, especially, one as complex as the reduction of an award of future lost earnings to present value, there is no entitlement to such an instruction. There was no objection lodged to the lack of such instruction. Other Circuits have had no difficulty resolving similar circumstances such as exist in this case. See, for example, Ivy v. Security Barge Lines, 585 F.2d 732 (5th Cir. 1978) (a Jones Act case);

Kokesh v. American Steamship Co., 747 F.2d 1092 (6th Cir. 1984) (a Jones Act case); O'Shea v. Riverway Towing Co., 677 F.2d 1194 (7th Cir. 1982); Alma v. Manufacturer's Hanover Trust Co., 684 F.2d 622 (9th Cir. 1982) (a Jones Act case); Deakle v. Graham & Sons, 756 F.2d 821 (11th Cir. 1985).

This Court in Pfeiffer declined to impose upon litigants any single method of determining the present value of an award of future lost earnings, but recognized the validity of the Alma, total offset or wash approach 462 U.S. 523 at 550 and n.31. The District Court's utilization of that approach was both logical and reasonable under the circumstances, as well being legally sufficient under Pfeiffer;

accordingly, there is no proper basis warranting the grant of petitioners writ of ceriorari.

II. THE OPINION OF THE THREE JUDGE PANEL, WHICH WAS ADOPTED BY THE MAJORITY OF THE FOURTH CIRCUIT, EN BANC, CORRECTLY FOUND AMPLE EVIDENCE TO SUPPORT THE VERDICT OF THE JURY, WHICH FOUND THE B&O LIABLE FOR NEGLIGENCE WHICH CONTRIBUTED TO THE INJURIES SUSTAINED BY THE PLAINTIFF.

The issue of the negligence of the B&O does not warrant the grant of a writ of certiorari where, as here, there was evidence presented at trial from which the jury could have found (1) that the B&O was negligent, and (2) that the negligence of the B&O caused or contributed to the injuries sustained by

Aldridge. The jury was properly instructed as to negligence, including full instruction as to the foreseeability of harm required to find that the negligence of the B&O contributed to or caused the plaintiff's injuries.

The petitioner seeks solace in the dissenting opinion filed with the Fourth Circuit en banc affirmance of the jury verdict. Both Judge Chapman in his dissent and the petitioner cite Inman v. B&O R.R. Co., 108 Ohio App. 124, 161 N.E. 2d 65 (1958), aff'd, 361 U.S. 138 (1959) as authority for a lack of foreseeability of harm in the case sub judice. Inman and this case are very obviously distinguishable, in that Inman involved a moving train, travelling

through a crossing, and the railroad, in that instance, could have done little or nothing more than it did to prevent the injuries to its employee. The present case involves a locomotive which was parked in a crossing (not a moving train) and it was obvious to the jury that the B&O could have taken steps to prevent the reoccurrence of impatient drivers attempting to sneak across the partially blocked intersection. A B&O employee admitted at trial that such crossings by impatient motorists frequently occurred when the intersection was only partially blocked. The evidence adduced at trial showed that the railroad only partially blocked the crossing, contrary to their usual practice; that the train occupied the

crossing during the wee hours of the morning for a period of 15-20 minutes; and that the engine bell was not being rung, indicating no imminent movement of the train. The jury could have found the railroad negligent as a result of any one or more of these factors, and could have reasonably inferred that the railroad's negligence was a factor which provoked or baited Brelsford's concurring act of negligence, resulting in the plaintiff's injuries.

There was ample evidence of negligence on the part of the B&O which contributed to the readily foreseeable harm sustained by George O. Aldridge, to permit submission of that issue to the jury. The railroad is responsible to its employee for the harm which he

sustained while in the course of his employment, and which likelihood of harm was both foreseeable and, in fact, created by the railroad. To hold the B&O responsible for George O. Aldridge's injuries in this case does not make the railroad an insurer of the safety of its employees, but simply imposes liability upon the railroad for its concurrent negligence which caused or contributed to the injuries sustained by its employee. The District and Fourth Circuit Appeals Court, through their rulings, determinations and judgments in this matter have simply implemented the intent of Congress under the F.E.L.A.

CONCLUSION

This case simply does not warrant the grant of a writ of

certiorari. The B&O is simply seeking relief from an adverse, but factually and legally sufficient verdict and judgment through the filing of its petition with this Court. The petitioner's request that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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I HEREBY CERTIFY THAT ON this 21st day of July, 1987, three copies of the aforegoing Opposition to Petition for Writ of Certiorari was handdelivered to H. Russell Smouse, Esq., George F. Pappas, Esq., and Holly N. Lindeman, Atty., Melnicove, Kaufman, Weiner, Smouse & Garbis, P.A., 36 S. Charles Street, 600 Charles Center South, Baltimore, Maryland 21201-3060, attorneys for Petitioner.

Richard R. Beauchemin

Richard R. Beauchemin,
Attorney for Respondents

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 84-1185

GEORGE O. ALDRIDGE and
DAISY M. ALDRIDGE,
Appellees,

v.

BALTIMORE AND OHIO RAILROAD COMPANY,
a body corporate,
Appellant,

v.

KEITH D. BRELSFORD and
ERIE INSURANCE EXCHANGE,
Defendants

Argued Oct. 10, 1985

Decided May 1, 1986

Rehearing in Banc Granted
June 24, 1986

Railroad crossing watchman brought action against railroad and motorist for injuries sustained when hit by motorist attempting to go over railroad crossing partially blocked by train. Railroad appealed from judgment of the United States District Court for the District of Maryland, at Baltimore, Walter E. Black, Jr., J., entered against it on jury verdict in sum of $196,800. The Court of Appeals, Sprouse, Circuit Judge, held that: (1) evidence was sufficient to support finding of negligence, future loss of earnings, and proximate cause, and (2) district court was not required to give instruction on present value of future earnings absent evidence from railroad pertaining thereto.

Affirmed.

Terrence William Boyle, District Judge, sitting by designation, filed concurring opinion.

1. Employers' Liability - 208

Evidence concerning train's partially blocking roadway while switching cars and length of time roadway was blocked was sufficient to support finding that railroad was negligent in manner in which it blocked crossing to permit railroad crossing watchman to recover under Federal Employers' Liability Act for injuries sustained when hit by intoxicated motorist attempting to cross. Federal Employers' Liability Act, Secs. 1-10, as amended, 45 U.S.C.A. Secs. 51-60.

2. Employers' Liability - 212

Testimony of railroad crossing watchman that pain in neck, as a result of being hit by motorist attempting to pass through crossing partially blocked by train, was so great that he could not work, was sufficient evidence of crossing watchman's inability to perform duties to support award for future loss of earnings, though there was expert evidence to contrary. Federal Employers' Liability Act, Secs. 1-10, as amended, 45 U.S.C.A. Secs. 51-60.

3. Employers' Liability - 212

Evidence that railroad crossing watchman had no pain prior to accident at crossing when motorist attempted to pass through crossing partially blocked by train, despite preexisting arthritic condition in neck, and that after

accident pain was so severe it eventually precluded him from performing job, was sufficient to support finding that injury and resulting inability to work were caused by accident and not preexisting condition, to permit recovery under Federal Employers' Liability Act. Federal Employers' Liability Act, Secs. 1-10, as amended, 45 U.S.C.A. Secs. 51-60.

4. Federal Civil Procedure - 1973

Federal Court - 905

Generally, coverage or noncoverage of party by liability insurance is not probative of any issue in negligence case and introduction of subject is reversible error.

5. Federal Courts - 905

Explanation to jury by insurer

of railroad crossing watchman that it was permitted to intervene as party defendant in action by watchman against railroad and motorist as result of watchman's being hit by motorist passing through crossing partially blocked by train by virtue of uninsured motorist provision of watchman's policy avoided possible confusion and allowed jury to concentrate on real issue in case, and disclosure of fact that motorist was uninsured as consequence did not require reversal.

6. Federal Courts - 628

Admission of local ordinance relating to amount of time train may block crossing, in action resulting from injuries sustained by railroad crossing watchman when motorist attempted to go

through crossing partially blocked by train, was not plain error, and failure to consider previously unraised point would not result in fundamental injustice, particularly where trial court struck ordinance from evidence and instructed jury that evidence was not applicable and that they were to disregard it. Federal Employers' Liability Act, Secs. 1-10, as amended, 45 U.S.C.A. Secs. 51-60.

7. Damages - 173(1), 226

Awards for loss of future earnings in federal actions should be reduced to present value and, thus, refusal to receive evidence of present value of future lost wages or failure to give requested instruction on present value is error.

8. Damages - 173(1)

Principle that refusal to receive evidence of present value of future lost wages in federal action is error must be applied consistent with tenet that instructing jury on theory which is unsupported by evidence presented at trial is also error.

9. Damages - 163(1), 173(1)

Defendant has burden of presenting evidence probative of appropriate interest rate and method of discount if defendant wishes fact finder to reduce gross amount of future lost wages to present value; plaintiff, in turn, may offer evidence tending to prove that award should be increased because inflation will diminish its current value, including what kind of

and how much inflation; refusing to follow DiSabatino v. National Railroad Passenger Corp., 724 F.2d 394 (3d Cir.).

10. Damages - 201(1)

District Court does not commit error by failing to instruct jury as to appropriate economic adjustment absent relevant evidence of discount or inflationary rates offered by either party to action.

11. Employers' Liability - 262

District court was not required to instruct jury to reduce award to railroad crossing watchman, as result of his being hit by motorist passing through crossing partially blocked by train, to present value, where railroad failed to introduce competent evidence from which jury could have determined

present value of watchman's proved future lost earnings. Federal Employers' Liability Act, Secs. 1-10, as amended, 45 U.S.C.A. Secs. 51-60.

George F. Pappas (H. Russell Smouse, Melnicove, Kaufman, Weiner, Smouse & Garbis, P.A., C. Keith Meiser, on brief), for appellant.

Richard R. Beauchemin (Norris W. Tingle, Geoffrey J.C. Boyd, on brief), for appellees.

Before SPROUSE and WILKINSON, Circuit Judges, and BOYLE, United States District Judge for the Eastern District of North Carolina, sitting by designation.

SPROUSE, Circuit Judge:

The Baltimore & Ohio Railroad

Company (the Railroad) appeals from a judgment entered against it after a jury verdict in the sum of $196,800 in favor of George Aldridge in this Federal Employers' Liability Act (FELA) suit. 45 U.S.C. Secs. 51-60 (1982). Aldridge filed suit after he suffered a neck injury while working for the Railroad as a crossing watchman. The Railroad contends that the district court erred in not granting its motions for a directed verdict or a judgment n.o.v.; in allowing Aldridge's intervening insurance company to reveal to the jury that the Railroad's co-defendant was uninsured; in admitting into evidence a city ordinance relating to the length of time a train can remain on a crossing; and in failing to require Aldridge to

prove the present value of his claim for future lost wages or, in the alternative, to instruct the jury to reduce any award for future lost wages to present value. We affirm.

George Aldridge was a crossing watchman for the Railroad assigned to the Baltimore Street crossing in Cumberland, Maryland. In the early morning of September 9, 1978, a Railroad engine engaged in switching cars approached the Baltimore Street crossing. As the engine approached, Aldridge manually activated the traffic lights to a red position for all lanes of vehicular traffic which converged on the crossing. The engine proceeded onto the crossing and stopped in a position by which it blocked 1/2 to 7/8 of

Baltimore Street. Aldridge then positioned himself in the portion of the crossing not occupied by the engine. He carried a light in each hand. Keith Brelsford, a highly intoxicated motorist, stopped short of the crossing, but grew impatient and shouted to Aldridge his desire to cross. Despite Aldridge's warning not to cross, Brelsford repeatedly accelerated his engine, then, without warning, released his brakes and drove his car across the opening of the crossing, striking Aldridge and knocking him to the ground. Brelsford drove on without stopping.1

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1 Later that day, Brelsford presented himself to the Cumberland Police. He admitted driving the car which struck Aldridge and that he had consumed eight or nine beers prior to the accident. Brelsford was charged with failure to remain at the scene of an accident resulting in bodily injury, reckless driving, and failure to obey a railway watchman. He was found guilty by a Maryland court and fined $750. He was later convicted of common law assault and sentenced to ten days in jail.

There was considerable evidence concerning the Railroad's procedure for switching cars in the vicinity of street crossings. The normal procedure was either to block the entire crossing or to cut the train so that traffic could pass. It was uncommon to block only part of the crossing. In addition, the Railroad's internal operating rules required:

> The engine bell must be rung when an engine is about to move, except momentary stops in continuous switching movements. It must be rung while approaching and passing public crossings at grade and stations, and through tunnels.

There was conflicting testimony concerning the length of time the engine was stopped on the crossing prior to the accident and whether its bell was

ringing. Aldridge's evidence was that the engine was stopped on the crossing for approximately fifteen to twenty minutes and the engine bell was not ringing. The Railroad's evidence indicated that the engine was stopped on the crossing for only two to five minutes and the engine bell was ringing the entire time.

Following the accident, Aldridge was taken to the hospital by ambulance, x-rayed, and released. He continued to receive medical attention for his neck, including medication, therapy and traction, and he was authorized to return to work approximately seventy-five days after

the accident.2 After returning to his job at the crossing, Aldridge continued working until January 3, 1981. At that point, according to his testimony, he stopped working because he could not longer stand the pain in his neck.

Medical evidence at trial indicated that Aldridge did not suffer neck pain prior to the accident, that the accident caused the pain by aggravating a preexisting neck condition, and that the pain will be of

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2 Because he took vacation time after his medical release, Aldridge did not actually return to work until December 24, 1978, some 106 days after the accident.

a permanent duration. It is unquestioned that Aldridge had a preexisting degenerative condition between three vertebrae in his cervical spine which would have continued to degenerate even without his injury from the accident. The Railroad's medical expert admitted, however, that trauma imposed upon the preexisting neck condition would likely produce pain even if none previously existed. There was conflicting evidence concerning Aldridge's ability to work after January 3, 1981. Aldridge testified that he was unable to work after that time, but medical experts testified that he remained capable of performing his duties as a crossing watchman.

A.

The Railroad contends that there was insufficient evidence to support a finding of negligence, future loss of earnings, or proximate cause of the injury. In testing the sufficiency of the evidence, we must view the evidence in the light most favorable to the jury's verdict and afford the prevailing party the benefit of all reasonable inferences which can be drawn from the evidence. Krotkoff v. Goucher College, 585 F.2d 675, 677 (4th Cir. 1978). Applying this standard, we believe there is adequate evidence to support the jury's conclusion on each of the points challenged by the Railroad.

[1] First, the Railroad asserts that even under the less

stringent FELA standards there was insufficient evidence to permit the case to go to the jury on the issue of liability. It argues that Brelsford's negligence was the sole cause of Aldridge's injury. We agree, of course, that Brelsford's negligence or intentional conduct was the predominant cause of Aldridge's injuries. There is no question, however, that there was sufficient evidence from which a jury could find that the Railroad was negligent in the manner in which it blocked the crossing. While there was conflicting evidence on several factual issues, considering the evidence, as we must, in a light most favorable to Aldridge, the train occupied the crossing for a period of fifteen to

twenty minutes, and, rather than block the entire crossing, the Railroad left half of the street open. In addition, the jury could have found that the Railroad employees were negligent in not ringing the engine bell. It was reasonable for the jury to infer that the Railroad's negligence was a factor in provoking Brelsford to react in the foolish and criminal manner which resulted in Aldridge being injured. In sum, we are unable to say that the trial could erred in not ruling as a matter of law that the Railroad's negligence did not "play[] any role in producing the harm." Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108, 116, 83 S.Ct. 659, 664, 9 L.Ed.2d 618 (1963). Rogers v. Missouri Pacific Railroad Co.,

352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957); Coray v. Southern Pacific Co., 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208 (1949).

Reasonable foreseeability is, of course, an essential ingredient to establishing negligence in a FELA case, as in other negligence actions. In the instant case, however, as in Gallick, the jury was instructed on the requirement of reasonable foreseeability. Gallick, 372 U.S. at 118, 83 S.Ct. at 665. From their verdict in favor of Aldridge, it is clear that the jury concluded that the Railroad should have realized the increased likelihood of a car striking Aldridge under the circumstances. Id. at 118-19, 83 S.Ct. at 665-66. The

evidence sufficiently supports that conclusion. The crossing was partially blocked for at least fifteen minutes in the early hours of the morning. There was testimony that occasionally motorists would illegally cross in front of a train when the crossing was only partially blocked. It is certainly not difficult to anticipate that motorists using the streets of Cumberland, Maryland might have an infinite number of reasons to be anxious to reach their destinations. Likewise, it should be easily foreseeable that many motorists, inebriated or not, might be unduly excited or frustrated because of real or imagined intrusions upon their rights to use the common streets and highways. We cannot say as a matter of law that a

defendant railroad should not have reasonably foreseen that negligence potentially affecting the broad spectrum of highway users would not have incited some senseless motorist to take reckless action.

[2] The Railroad also attacks the sufficiency of the evidence relating to Aldridge's inability to perform his duties as a crossing watchman. We disagree with the Railroad and find the evidence sufficient to make this ultimate factual issue a question for the jury to resolve. It is true that this evidence consisted solely of Aldridge's testimony that the pain in his neck was so great that he could not work. His testimony, however, was not discredited, and although there was

expert evidence to the contrary, the ultimate authority for weighing the totality of evidence reposes in the jury. Price v. Admiral Corp., 527 F.2d 412, 415 (5th Cir. 1976) (jury at liberty to accept or reject expert testimony). See Sentilles v. InterCaribbean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (1959).

[3] Similarly, the Railroad's third argument that there was insufficient evidence to prove that Aldridge's inability to work was proximately caused by the accident involves factual issues properly resolved by the jury. There is no question that Aldridge had a preexisting arthritic condition in his neck. He testified, however, that he had no pain

prior to the accident and that after the accident the pain was so severe that it eventually precluded him from performing his job. Medical experts including those for the Railroad, testified that Aldridge never complained of pain prior to the accident and that the injury he received could have aggravated his preexisting neck condition to the extent that it would have caused pain where none previously existed. We believe this was sufficient evidence upon which the jury could find that Aldridge's injury and resulting inability to work were caused by the accident and not his preexisting condition. Sentilles, 361 U.S. at 109-10, 80 S.Ct. at 175.

B.

The Railroad's remaining arguments are that the district court committed errors of law in allowing Aldridge's intervening insurance company to advise the jury that Brelsford was uninsured; in admitting into evidence a Cumberland municipal ordinance relating to the length of time a train can remain on a crossing; and in failing to require Aldridge to prove the present value of his claim for future lost wages or, in the alternative, to instruct the jury to reduce any award to present value.

[4,5] We need not linger long over the first of these arguments. Since Brelsford was uninsured Aldridge's insurance carrier, Erie Insurance Exchange (Erie), was allowed to

intervene as a party defendant pursuant to the uninsured motorist provision of Aldridge's policy. In its opening statement, Erie explained its presence as a defendant to the jury, including the fact that Brelsford was uninsured. As a result, the Railroad moved for a mistrial, which the district court denied. The general rule, of course, is that the coverage or noncoverage of a party by liability insurance is not probative of any issue in a negligence case and introduction of that subject is reversible error. Langley v. Turner's Express, Inc., 375 F.2d 296 (4th Cir. 1967). This case, however, did not involve the typical instance of either plaintiff or defendant apprising the jury of the presence or absence of

insurance. Erie was a party by intervention, and a jury might well have been mystified as to why an insurance company was a co-defendant in a case involving a railroad and a named individual as the other defendants. Under these circumstances an explanation to the jury could have avoided possible confusion and allowed the jury to concentrate on the real issue in the case. The possibility of prejudice to the Railroad, moreover, was minimal.

[6] The railroad next argues that admission of the Cumberland municipal ordinance relating to the amount of time a train may block a crossing was error because the ordinance was enacted to control traffic, therefore, evidence of a violation is

not probative of negligence on facts such as involved here. Aldridge contends that the Cumberland ordinance is broader than most similar ordinances and was intended to prevent both delays of traffic and accidents such as the one involved in this case. If so, the ordinance might be probative, but it is not necessary to decide that question. The Railroad did not object to the admission of the ordinance, and we simply will not consider objections not raised at trial in the absence of plain error. Bryant v. Sears, Roebuck & Co., 435 F.2d 953, 956 (4th Cir. 1970); cf. United States v. Barge Shamrock, 635 F.2d 1108, 1111 (4th Cir. 1980), cert. denied, 454 U.S. 830, 102 S.Ct. 125, 70 L.Ed.2d 107 (1981). The admission of

the ordinance was not plain error, and we preceive no fundamental injustice in now refusing to consider this previously unraised point. Moreover, prior to closing arguments, the trial court struck the ordinance from evidence and instructed the jury that the ordinance was not applicable and that they were to disregard it. We think any error in admitting the evidence was cured by the instruction to disregard it. See Purex Corp. v. St. Louis National Stockyard Co., 374 F.2d 998 (7th Cir.), cert. denied, 389 U.S. 824, 88 S.Ct. 59, 19 L.Ed.2d 77 (1967). See generally 11 C. Wright & A. Miller, Federal Practice and Procedure Sec. 2885 (1973).

The Railroad' last argument relates to the longstanding principle of

damages that the amount of future lost wages must be reduced to present value. Chesapeake & Ohio Railway Co. v. Kelly, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916). At the close of the trial, Aldridge argued to the jury that it should value his future lost wages at $16,306 a year for the next seven years until age 65 for a total of $114,142. The Railroad moved for a mistrial on the grounds that Aldridge's failure to introduce evidence from which the jury could reduce future lost wages to present value was reversible error. The district court denied that motion and the Railroad's subsequent motion for an instruction that the jury must discount any award for future lost wages to present value. The jury returned a

verdict in favor of Aldridge in the amount of $196,800.

[7,8] Awards for loss of future earnings in federal actions should be reduced to present value. Jones & Laughlin Steel Corp. v. Pfeiffer, 462 U.S. 523, 536-37, 103 S.Ct. 2541, 2550-51, 76 L.Ed.2d 768 (1983).3 Thus, as a matter of federal law, the refusal to receive evidence of the present future lost wages or the failure to give a requested instruction on present value is error.

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3 Concomitantly, it is appropriate to increase an award for loss of future earnings by a formula which accounts for reduction in future value by the ravages of inflation. Pfeiffer, 462 U.S. at 538-51, 103 S.Ct. at 2551-57.

St. Louis Southwestern Railway Co. v. Dickerson, U.S. , 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). Courts, however, must apply these principles consistent with the tenet that instructing the jury on a theory which is unsupported by the evidence presented at trial is also error. See Salem v. United States Lines Co., 370 U.S. 31, 39, 82 S.Ct. 1119, 1124, 8 L.Ed.2d 313 (1962) (Harlan, J., dissenting in part and concurring in part); Wilmington Star Mining Co. v. Fulton, 205 U.S. 60, 77-79, 27 S.Ct. 412, 418-19, 51 L.Ed. 708 (1907); Krizak v. W.C. Brooks & Sons, Inc., 320 F.2d 37, 38-41 (4th Cir. 1963).

The Supreme Court has not allocated the burden of proceeding or

the burden of persuading the jury as to either the reduction to present value or the increase for inflation. Simply stated then, the issue is whether reduction to present value is an indispensable element of the plaintiff's claim for future lost wages which he must always prove by specific evidence or whether, absent contest by the defendant, the plaintiff sufficiently proves his claim by evidence of the gross amount of those lost wages. This approach, however, overlooks many complicated issues which arise in this amorphous area combining law and economics. As the Supreme Court said in Pfeifer, "the question of lost earnings can arise in many different contexts. In some sectors of the economy, it is

far easier to assemble evidence of an individual's most likely career path than in others." 462 U.S. at 547, 103 S.Ct. at 2555. Added to this obstacle of prediction are the many factors which can complicate the calculations of present value admirably discussed in Pfeifer: Should the discount rate be a "market" interest rate or a "real" interest rate adjusted for inflation, and, if the latter, for what period or periods of inflation? 462 U.S. at 541-43 & n.26, 103 S.Ct. at 2552-54 & n.26. To prove that the gross amount of future wages established should be increased because projected inflation is greater than projected interest rates, what type of inflation should a plaintiff use-pure economic inflation or

the various types of individual and societal inflation discussed by the Court in Pfeifer, e.g., future production efficiency, increased skills and different collective bargaining approaches? 462 U.S. at 535-36, 549-51 & n.31, 103 S.Ct. at 2549-50, 2556-57 & n.31. These facts make it clear that the question of allocating the burden of proof is not one dimensional.

[9] The Ninth Circuit resolved the problem by holding in effect that the party who would benefit from the application of a particular economic formula has the burden of producing competent evidence to prove it. Alma v. Manufacturers Hanover Trust, 684 F.2d 622, 626 (9th Cir. 1982). Contra DiSabatino v. National Railroad

Passenger Corp., 724 F.2d 394, 395 (3d Cir. 1984) (burden of producing evidence of present value of future lost wages rests on plaintiff). If a defendant wishes the factfinder to reduce the gross amount of future lost wages to present value, he can present evidence probative of an appropriate interest rate and method of discount. The Plaintiff, in turn, may offer evidence tending to prove that the award should be increased because inflation will diminish its current value. In that case, the plaintiff must show what kind of and how much inflation. See Pfeifer, 462 U.S. at 534-36, 538-51, 103 S.Ct. at 2549-50, 2551-57. We think this is a sensible approach. In most cases, the factors are simple, and it should be a

light burden for the defendant to prove a proper discount rate or for the plaintiff to prove the probable effects of inflation. As noted by the Court in Pfeiffer, "[t]he average accident trial should not be converted into a graduate seminar or economic forecasting.'" 462 U.S. at 548, 103 S.Ct. at 2556 (quoting Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 39 (2d Cir. 1980), cert. denied, 451 U.S. 971, 101 S.Ct. 2049, 68 L.Ed.2d 351 (1981). To the extent that the issue in a given case necessarily becomes difficult, it seems fair to place the burden of procuring and presenting economic evidence on the litigant who would benefit from its acceptance by the factfinder.

[10] A trial court, of course,

must admit relevant evidence of discount or inflationary rates offered by either party and grant a tendered instruction based on that evidence. In the absence of such evidence, however, the court does not commit error by failing to instruct the jury as to the appropriate economic adjustment. If the litigants are represented by normally competent counsel, any omission of proof or failure to proffer instructions probably will have resulted from deliberate trial strategy. Defense or plaintiff's counsel may well be satisfied with the unadjusted amount of future lost wages-fearing the consequences of encouraging the factfinder to consider the use of other economic factors. As the Sixth Circuit stated in Kokesh v.

American Steamship Co., 747 F.2d 1092, 1096 (6th Cir. 1984):

> Litigants in the federal courts frequently agree to forego the time and expense involved in proving inflationary trends and discount rates in trials involving lost future wages. In many cases, defense counsel may wisely conclude that there is little benefit to be gained and substantial prejudice to be risked in giving the jury a very particularized instruction on the calculation of damages.

[11] In the instant case, the litigants were represented by competent counsel. Aldridge proved the dollar amount of his future lost earnings. It would have been to the Railroad's advantage to give the jury an opportunity to reduce this amount by introducing competent evidence from which the jury could have determined its

present value.4 We do not think the Railroad, having failed to present such evidence at trial, should be permitted on appeal to complain of its absence. See Deakle v. John E. Graham & Sons, 756 F.2d 821, 830-31 (11th Cir. 1985).

We also think it would have been extremely confusing to the jury to ask it to make these economic adjustments without an evidentiary basis or an explanation by experts as to show such calculations could be made. Application or the principle of present worth (and, likewise, the principle of indexing for inflation) is beyond the

4 Likewise, it would have been to Aldridge's advantage to give the jury an opportunity to increase this amount by the forces of inflation. Therefore, it was his prerogative and responsibility to introduce competent evidence which would have allowed the jury to do so.

understanding and capabilities of most lay persons serving on a jury. Kelly, 241 U.S. at 491, 36 S.Ct. at 632. Without evidence of how to adjust for present value or inflation, a jury instructed to make such calculations on its own might well present an award based on sheer speculation.

In the absence of any evidence by which future lost wages could be reduced to present value, we see no error in the district court's failure to grant a mistrial or to instruct the jury to undertake the task by utilizing its own initiative.

In view of the above, the decision of the district court is affirmed.

AFFIRMED.

BOYLE, District Judge, concurring:

I concur in the result reached by the majority and join in their reasoning on all but one issue. That issue is the allocation of the burden of proof for the present value of lost future earnings. In my opinion, that burden must rest with the plaintiff.

We are in agreement that lost future earnings must be reduced to their present value. St. Louis Southwestern Railway Company v. Dickerson, ____ U.S. ____ 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985), Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983).

The majority places the burden on the defendant to prove this material

element of plaintiff's claim.

A defendant has no burden to prove any of the contested material issues of fact in a plaintiff's cause of action. The present value of lost future earnings is not an affirmative defense but rather a material element of the plaintiff's claim for that special damage.

If the plaintiff fails to offer any evidence of one or more of the elements of this special damage, then as a matter of law, the plaintiff's proof has failed and that claim should not be submitted to the jury.

The plaintiff has the burden at all times to prove by some competent evidence each of the material facts of his claim. Where part of plaintiff's

case, as it was here, is for the special damage of lost future earnings, then plaintiff must offer some evidence of the earnings, the future term, and the present worth of this sum.

In order to test the sufficiency of the plaintiff's evidence, a defendant must exercise its right under Rule 50 of the F.R.Civ.P. at the appropriate time at trial. This the defendant failed to do, and for this reason I concur in the result.

Rule 50 provides that a party making the motion base it on specific grounds. The defendant moved pursuant to Rule 50 and based it on "the issue of liability". This motion was renewed at the end of all of the evidence by the defendant "for precisely the same

reasons - cited at the close of the plaintiff's case".

The defendant never challenged the sufficiency of the plaintiff's evidence on the special damage of lost future earnings. In particular, the defendant allowed the plaintiff to proceed unchallenged through argument without any evidence on the present worth of the lost future earnings. A defendant must make a timely challenge to the sufficiency of the plaintiff's case and the failure to do so will bar relief on motion for JNOV and here on appeal. Under the circumstances presented to the trial judge he correctly refused to charge on the present worth of these lost future wages.

Likewise, the trial judge correctly refused to allow a mistrial based on plaintiff's argument. The argument was faithful to the evidence, even if the evidence was insufficient in law.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 84-1185

GEORGE O. ALDRIDGE and
DAISY M. ALDRIDGE,
Appellees,

v.

BALTIMORE AND OHIO RAILROAD COMPANY,
a body corporate,
Appellant,

v.

KEITH D. BRELSFORD and
ERIE INSURANCE EXCHANGE,
Defendants.

Argued Oct. 7, 1986

Decided March 25, 1987

George F. Pappas, Baltimore, Md. (H. Russell Smouse; Melnicove, Kaufman, Weiner & Smouse, P.A.; C. Keith Meiser, Baltimore, Md., on brief), for appellant.

Richard R. Beauchemin, Baltimore, Md. (Norris W. Tingle, Geoffrey J.C. Boyd; Arnold, Beauchemin & Tingle, P.A., Baltimore, Md., on brief), for appellees.

Before RUSSELL, WIDENER, HALL, PHILLIPS, SPROUSE, ERVIN, CHAPMAN, WILKINSON and WILKINS, Circuit Judges, sitting en banc.

SPROUSE, Circuit Judge:

The Baltimore & Ohio Railroad Company appeals from a judgment entered against it after a jury verdict in the sum of $196,800 in favor of George

Aldridge in this Federal Employers' Liability Act (FELA) suit. 45 U.S.C. Secs. 51-60 (1982). Aldridge, a railroad crossing guard employed by the Railroad Company, was struck by an intoxicated motorist who deliberately crossed in front of a railroad engine partially blocking a crossing in Cumberland, Maryland. After a judgment on a jury verdict in his favor, the Railroad appealed to this court raising numerous grounds for reversal, including its principal contentions that it was not negligent, and that the district court erred by refusing to instruct the jury that they must reduce Aldridge's damages to their present value, even in the absence of any trial evidence of present value.

A panel of this court affirmed the judgment of the district court. Aldridge v. Baltimore & Ohio Railroad Co., 789 F.2d 1061 (4th Cir. 1986). We granted the Railroad's petition for rehearing en banc and now, after rehearing, again affirm. A majority of the en banc court, consisting of Judges Phillips, Sprouse, Ervin, Wilkinson, and Wilkins affirm the district court's ruling that the jury's finding of negligence on the part of the Railroad was sufficiently supported by the evidence. Judges Russell, Widener, Hall, and Chapman voted to reverse that holding. A majority of the en banc court consisting of Judges Hall, Phillips, Sprouse, Wilkinson, and Wilkins voted under the circumstances of

this case to affirm the district court's refusal to instruct the jury to reduce Aldridge's damages to present value. Judges Hall, Sprouse, Wilkinson, and Wilkins would affirm this holding on the reasoning of the original panel opinion. Judge Phillips concurs in this result for the reasons stated in his concurring opinion.

The judgment of the district court is, therefore, affirmed.

AFFIRMED.

PHILLIPS, Circuit Judge, concurring specially:

I concur in the result reached by the majority which affirms both as to liability and damages.

I write specially on the damages issue because I believe that the

district court erred in declining to instruct the jury that it should award only the present value of lost future earnings, but I would hold the present value of lost future earnings, but I would hold that this error was harmless under the circumstances.

The Supreme Court has recently reiterated the lonstanding rule that defendants in FELA cases are "entitled," upon request, to such a jury instruction.1 St. Louis Southwestern Railway Co. v. Dickerson, 470 U.S. 409,

1 This jury instruction rule is in turn based upon the underlying "substantive-remedial" rule that, in confirmity with the general "lump sum compensatory award" approach of federal law, the measure of compensability for a lost stream of expected income is necessarily its present value. See Jones & Laughlin Steel Corp. v. Pfeifer, 462, U.S. 523, 533, 103 S.Ct. 2541, 2548, 76 L.Ed. 2d 768 (1983).

411, 105 S.Ct. 1347, 1348, 84 L.Ed.2d 303 (1985) (per curiam). But the Court has not spokem to the related but independent question of which party has the burden of proof with respect to factors that would either decrease or increase the gross amount of lost earnings to reflect their present value. This, in fact, is the issue that has mainly divided the lower federal courts on the general matter. Cf. e.g. Alma v. Manufacturers Hanover Trust Co., 684 F.2d 622 (9th Cir. 1982) (burden on defendant); DiSabatino v. National Railroad Passenger Corp., 724 F.2d 394 (3d Cir. 1984) (burden on plaintiff). This circuit has not decided that issue and it is therefore an open one with us. Because I believe that its resolution

actually controls the nature of a party's entitlement to the instruction requested but not given here, I think we should decide it now.

On that open question, I would hold that each party has the burden with respect to factors that tend to favor its respective position: the plaintiff to prove that present value is more than total lost earnings, the defendant that it is less. This, rather than a rule that places the burden to establish present value exclusively on one or the other party seems to me both the most practical and the most conceptually sound basis for allocating the burden of proof on the issue. See generally F. James & G. Hazard Civil Procedure, Sec. 7.8 (2d ed. 1977).

From this would necessarily flow the corollary rule that a party producing legally sufficient evidence on the issue is entitled to a jury instruction that adequately indicates to the jury how the evidence could be used to convert to present value, either up or down. In particular cases, of course, both sides might produce specific evidence (of inflation or deflation, interest trends, etc.) favorable to their positions. In such cases, each side would be entitled to specific instructions as to how its evidence if accepted might be used to adjust lost earning totals to present value.

On the other hand, failure to produce any specific evidence on the

issue should have the normal effect of disentitling a party to any specific instruction on the issue. In some cases, this might require instructions specifically favorable to only one of the parties, where only that party produced evidence on the issue. In others, it might disentitle both parties to any specific instructions on the method of converting to present value. In the latter situation, however, both parties would still be entitled, upon request, to a general instruction that in computing any amount due for lost earnings the award should be for present

value.2 That is what Dickerson seems to me unmistakebly to hold, but I think that is all it holds. The fact that the Dickerson court referred only to defendant's entitlement simply reflects the fact that it was the defendant in that case (as normally it would be) who objected to the failure to give any instruction on the issue.

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2 In many cases opposing counsel undoubtedly tacitly agree not to introduce any specific present value evidence, mutually accepting that it would simply wash out or be offset by conflicting evidence, or would create more of a risk of damaging confusion than likelihood of benefit. Some courts have indeed adopted a "total offset" approach to avoid or minimize the difficult evidentiary problems that the underlying damages rule inevitably creates. See Pfeifer, 462 U.S. at 554-46, 103 S.Ct. at 2554-55. Certainly it should be possible under the federal rule for the parties formally to avoid, by stipulation, any need for or entitlement to even a general present value instruction.

Where the only entitlement is to such a general instruction, i.e., where neither party has introduced specific evidence on the issue, it is hard to see how the failure to give even a general instruction could be treated as prejudicial. Where a party has produced no specific evidence of facts affecting present value computation, the lack of any instruction on the present value issue would seem necessarily harmless error as to that party.

So I would hold here. In faithfulness to Dickerson's most recent recognition of a right in the defendant to have the jury generally instructed to award only present value, it was error here to refuse such an instruction. But where, as here, defendant produced no

specific evidence as to how, favorably to it, this should be done, the error is necessarily harmless.

CHAPMAN, Circuit Judge, dissenting:

I.

Concurring in the judgment in Inman v. Baltimore & Ohio Railroad Company, 361 U.S. 138, 142, 80 S.Ct. 242, 244, 4 L.Ed.2d 198 (1959), Justice Whittaker stated:

> Reduced to substance, the simple facts are that petitioner, a crossing flagman, while standing in a welllighted intersection alongside a passing train in the nighttime and swinging a lighted red lantern in each hand, was struck, knocked down and run over by a drunken driver. What, I ask, did respondent do or omit that caused or contributed to cause that casualty? How could it have prevented the casualty? Petitioner says that respondent failed to provide him with "enough protection." About the

> only way, as I perceive, that respondent could protect its crossing flagmen against injury from such lawless conduct by third persons would be to provide them with military tanks and make sure they stay in them while within or moving about crossing-intersections in the performance of their duties-and I am not even sure that this method, though ironclad, would be certain protection to a flagman against lawless injury by third persons, for someone might shoot him, an act not very different, it seems to me, from the drunken driver's conduct which injured petitioner in this case, and for which injuries he insists, and four members of this Court agree, a jury should be permitted to require respondent to pay damages. How this can be thought to square with any known concept of "negligence" by respondent is beyond me.

Although not employing as colorful an analogy, the majority in Inman held that the conclusion could not reasonably be drawn that "negligence of the employer played any part at all in the

injury. . . ." Id. at 140, 80 S.Ct. at 243.

It is undoubtedly true that the insistent locomotion of judicial interpretation has over time rendered the railroad employer liable for injuries incurred by his employees in which the employer's "negligence played any part, even the slightest." Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed. 2d 493 (1956). The Act does not make the employer an insurer, however. Inman, supra, at 140, 80 S.Ct. at 243. That the harm complained of was reasonably foreseeable is still "an essential ingredient of Federal Employers' Liability Act negligence." Gallick v. Baltimore & Ohio Railroad

Company, 372 U.S. 108, 117, 83 S.Ct. 659, 665, 9 L.Ed.2d 618 (1962).

The panel opinion states that, because "it should be easily foreseeable that many motorists, inebriated or not, might be unduly excited or frustrated because of real or imagined intrusions upon their rights to use the common streets and highways," it was reasonably foreseeable that the train's partial blockage of the railroad crossing would have "incited some senseless motorist to take reckless action." I believe that the panel has misapplied the standard defining reasonable foreseeability.

Because there was testimony that motorists had upon occasion illegally crossed in front of a train partially blocking an intersection, a

conclusion that the railroad could reasonably foresee that event re-occurring is correct. That occurrence, however, was not what happened in this case. The defendant railroad, presumably in light of its experience regarding illegal railway crossings, had posted the crossing watchman Aldridge across the unoccupied opening. Aldridge's function was, by virtue of his position and his lights, which he carried in each hand, to preclude any re-occurrences of the illegal crossings. That precaution duly taken, the event that a drunken motorist would thereupon drive his car illegally through the "opening," thus running over the positioned watchman, was of a kind not previously experienced. "There was

'no evidence of prior occurrences of the kind here under consideration' in the record." Inman, supra, at 141, 80 S.Ct. at 244, quoting Inman v. Baltimore & Ohio Railroad Co., 108 Ohio App. 124, 131, 161 N.E.2d 60, 66 (1958). Absent any such evidence, the jury was unable as a matter of law to find that the railroad could have reasonably foreseen the motorist's criminal action. The reasonable foreseeability of the harm, an "essential ingredient" of negligence in an FELA action, is unproved. Gallick, supra, 372 U.S. at 117, 83 S.Ct. at 665.

The unintended effect of the panel's misapplication of the reasonably foreseeable standard is to render nugatory this "essential ingredient" of

neligence. The foreseeability test, as applied by the panel, would adjudge the re-occurrence of an illegal crossing foreseeable even where a "senseless" driver disregarded precautions adopted after the prior occurrences. Because the panel's foreseeability standard does not focus on the foreseeability of re-occurrence in light of the safety precautions adopted, but rather ignores them, the standard knows no bounds: even if, to borrow Justice Whittaker's analogy, the watchman were encased in an armored tank, his being struck by a drunken motorist is foreseeable simply because other motorists, presumably sober but impatient, drove across open track absent a watchman blocking their path. Indeed, under the panel's broad

test of foreseeability, the "essential ingredient" can likely be presumed, as a plaintiff can simply point to the fact that an employer had taken a precaution against a certain harm to show that he reasonably foresaw that harm re-occurring.

Against the danger of illegal crossings, the railroad interposed a watchman. Against the danger of his being accidentally run over, the railroad gave him lights. Regarding the danger that a drunken driver might ignore both and wilfully run down the watchman, the occurrence was unforeseen. The lonely fact that automobiles had steered around stopped trains and crossed open tracks in the past does not tend to prove that they will do so again

in an accelerating automobile in wilful disregard of the value of human life. The issue of negligence should not have gone to the jury.

II.

It is a fundamental rule of law that a plaintiff is entitled only to his provable damages, and no more. Where a plaintiff seeks damages for a value which would have accrued in the future, e.g., lost future wages, and he seeks to acquire that future value presently, then it is a matter of common sense that the future value should be reduced to its present value in order to account for the time value of money. It is this present value which reflects the full damages suffered by the plaintiff, and consequently fully remedies his loss.

To permit the plaintiff to acquire a greater value for loss of future wages, above his proved amount, constitutes an unjust enrichment, and should not sanctioned by law.

It is also a fundamental feature of our legal system that the defendant is not required to produce evidence. The burden of proving injury, negligence, causation, and damages is on the plaintiff, and his failure to do so adequately, even in the absence of any rejoinder by the defendant, entitles the defendant to judgment.

The Supreme Court recently stated that it is "clear" that "a defendant in an FELA case is entitled to have the jury instructed that 'when future payments or other pecuniary

benefits are to be anticipated, the verdict should be made up on the basis of their present value only.'" St. Louis Southwestern Railway Company v. Dickerson, 470 U.S. 409, 411 105 S.Ct. 1347, 1348, 84 L.Ed. 2d 303 (1985) (per curiam), quoting Chesapeake & Ohio Railroad Company v. Kelly, 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916). In the case presented, the defendant requested during trial an instruction regarding the need to reduce damages to present value, which request the district court found sufficent to preclude a waiver of the issue. Thus, it seems self-evident that the defendant was entitled to a present value instruction. Although the panel opinion agrees with this proposition, it holds

that the defendant is not "entitled" to such an instruction unless he has carried his newly imposed burden to lay the necessary evidentiary foundation for the instruction. I believe this imposition has the effect of restricting this entitlement in a manner not sanctioned by the Supreme Court.

Dickerson, supra, involved a case where the plaintiff had presented evidence of his future wage loss. The defendant requested that the judge submit an instruction to the jury to the effect that the jury should reduce the award for lost wages to its present value. It does not appear from the opinion that the defendant produced any evidence on which to base the instruction. The Supreme Court held

that, although "no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other souces of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damage award is error." Id. at 412, 105 S.Ct. at 1349. The Supreme Court reversed on this failure. Similarly, in Jones & Laughlin Steel Corporation v. Pfeifer, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed 2d 768 (1983), neither party had offered any expert testimony concerning predicted future rates of inflation, interest rates, or their connection. The Supreme Court stated that, "whatever

the rate the District Court may choose to discount the estimated stream of future earnings, it must make a deliberate choice. . . ." Id. at 552-553, 103 S.Ct. at 2558. Thus the Supreme Court remanded the case to the district court on this issue.

Although the Supreme Court has clearly given lower federal courts latitude in determining by what method they choose to discount awards of future wages to present value, including permitting courts to adopt the "total offset" method, and permitting litigants to stipulate that present value will not be requested, it does not seem that the Supreme Court has ever wavered from its requirement that the defendant is entitled to a present value instruction.

The Sureme Court has held steadfastly to its principle that the defendant is entitled to a present value instruction lest the damages be comprised of "'more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded.'" Dickerson, 470 U.S. at 412, 105 S.Ct. at 1349, quoting Kelly, 241 U.S. at 491, 36 S.Ct. at 632. Where the parties have failed to introduce evidence of the proper measure of present value, and the defendant has been denied his entitlement to an instruction, the Supreme Court has reversed the judgment. Pfeifer.

The principle established by the panel is beguilingly attractive.

Clearly a great deal of law can be explained by the proposition that each litigating party should have the burden of proving facts or theories which serve his interest. This principle, however, is but one of many, and must in this instance be considered in light of the less comely, but perhaps better established principle that the plaintiff is entitled to his actual losses, and no more. This latter principle may fail to produce the elegant result, but will serve to respect the prerogative of the defendant to decline to produce evidence, and will furthermore respect the integrity of the judicial system in its difficult task of finding a proper award of damages for loss of future wages. The defendant should not have to

carry the burden of laying the evidentiary basis for a present value instruction. I respectfully dissent.

I am authorized to say that Judge RUSSELL and Judge WIDENER join this dissent; Judge HALL joins in Part I and Judge ERVIN joins in Part II of the dissent.

UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. B-81-1566

GEORGE O. ALDRIDGE

v.

BALTIMORE AND OHIO RALROAD COMPANY,
a body corporate

GEORGE O. ALDRIDGE
and DAISY M. ALDRIDGE, his wife

v.

KEITH D. BRELSFORD,
ERIE INSURANCE EXCHANGE,
Intervening Defendant

Crossclaim

BALTIMORE AND OHIO RAILROAD COMPANY,
a body corporate

v.

KEITH D. BRELSFORD

ORDER

Presently pending in this case is the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New trial filed by defendant, Baltimore and Ohio Railroad Company. The Court has carefully considered defendant's motion, the supporting Memorandum, the Opposition filed on behalf of plaintiff, George O. Aldridge, and defendant's Response to plaintiff's Opposition, as well as oral argument presented by counsel for respective parties at a hearing herein on December 30, 1983. In accordance with the Court's oral opinion rendered at the conclusion of that hearing, IT IS, this 10th day of January, 1984, ORDERED as follows:

1. That the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial (including the request therein that the Court order a new trial unless plaintiff, George O. Aldridge, agrees to remittitur), filed herein by defendant, Baltimore and Ohio Railroad Company (Paper 46) BE and the same hereby IS, DENIED, EXCEPT as to defendant's assertion that the Court erred in refusing to instruct the jury on reducing any award for plaintiff, George O. Aldridge's future wage loss to present value, and as to which assertion the Court reserves its decision.

2. That the Clerk shall transmit copies of this Order to counsel of record for all of the parties to this action.

WALTER E. BLACK, JR.
United States District Judge

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MEMORANDUM OPINION

This case under the Federal Employers' Liability Act was tried before a jury beginning on August 8, 1983. the jury returned a verdict in favor of the plaintiffs, George O. Aldridge and Daisy M. Aldridge. On October 12, 1983, the court entered judgment in accordance with that verdict.1 George O. Aldridge was awarded judgment in the amount of $196,800. against both defendant Keith D. Brelsford, as to whom a default

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1 A dispute as to apportionment of the judgment between the defendants and George Aldridge's insurance carrier, and the need for input from counsel on that issue, caused the more than three-month delay between the verdict and entry of judgment.

juddgment had been previously entered, and against defendant Baltimore & Ohio Railroad Company. Mr. and Mrs. Aldridge were awarded a judgment in the amount of $25,000 against defendant Keith D. Brelsford for loss of consortium. On December 30, 1983, this Court heard argument on several post-trial matters and motions, including that of the defendant B & O for judgment notwithstanding verdict or in the alternative, for a new trial (Paper 46). By Order dated January 10, 1984, the Court denied B & O's motion on all grounds except the one presently pending, as to which it reserved its decision. That ground, the subject of this Memorandum Opinion, is whether the Court's decision not to instruct the

jury that it could take into account the present value of future wages in assessing damages was error and accordingly, the basis for ordering a new trial limited to the issues of discounting future wages to present value. The issues have been fully briefed, and the Court has had the benefit of oral argument and subsequent correspondence with counsel, (which has been filed in the Court file) and a full discussion with counsel at a chambers conference on April 5, 1984.

The events underlying this motion were as follows. At trial, neither party presented any evidence on the appropriate discount method or rate, the appropriate inflation rate, the tax liability to which the plaintiff's lost

wages would be subject, or other "societal forces" that should be taken into account in assessing damages for loss of future wages. See Jones & Laughlin Steel Corp. v. Pfeifer, 103 S.Ct. 2541 (1983). The only evidence in this regard was the yearly earnings of George Aldridge ($16,306.) and his work-life expectancy (seven years).

On the final day of trial, before the midday recess, the Court inquired of B & O whether it wished an instruction on discounting wages to present value. B & O had previously requested no such instruction. The Court stated that the matter could wait until after the recess, and that B & O's counsel should consider the issue in the meantime. Upon the resumption of trial, B & O

moved for a mistrial,2 claiming that the plaintiffs' failure to introduce any evidence on the appropriate discount rate was fatal to its case.3 The following colloquy then ensued:

> THE COURT: Okay, Well, I'll leave that for a higher authority and deny your motion for a mistrial and accordingly also not include any reference to it in my instructions.

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2 A mistrial would not appear to be the appropriate remedy, even if B & O's theory was correct. If the failure of the Plaintiffs to introduce evidence on discounting to present value was fatal to their case, the appropriate remedy would seem to be dismissal under Rule 41(b) of the Federal Rules of Civil Procedure

3 B & O limited the grounds of its mistrial motion to the failure of the plaintiffs to introduce evidence of discount. B & O did not mention the absence of evidence of the other "societal forces."

MR. PAPPAS: All right, You're not going to say anything then about present--

THE COURT: Oh, no. I don't think most people have the faintest idea what we would even be talking about. Okay. Well, then I guess we're ready for the jury.

(Thereupon, the jury returned to the Courtroom at 1:40 o'clock P.M.)

As the transcript indicates, the Court denied B & O's motion for a mistrial, holding that a plaintiff's failure to introduce any evidence of the discount rate was not fatal to its case. The Court also refused to instruct on discounting to present value, being of the opinion that, in the absence of any evidence, the instruction would make no sense to the jury. Presumably because no discount instruction would be given,

the plaintiff requested no instruction on the effects of inflation. Nor was any instruction on the factor of income tax liability requested. On the basis of the evidence admitted and instructions given, the jury found that Mr. Aldridge was entitled to $161,800. for lost wages andmedical expenses. That figure represents a straight calculation of lost wages damages figured by mutliplying the number of employment years lost by the plaintiff's annual salary.4

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4 The trial transcript and the evidence clearly establish the $161,800. figure, and that the jury computed future wages by simply multiplying employment years lost by yearly wage. The relevant portion of the transcript reads as follows:

> THE CLERK: What amount of damages do you assess as
> (Continued)

4 (Continued)
to Mr. Aldridge individually?
THE FORELADY: Damages only, 161,800.
THE CLERK: Would you repeat that, please?
THE FORELADY: $161,800.
THE CLERK: One sixty one--
THE FORELADY: Right.
THE CLERK: --thousand, eight hundred dollars?
THE FORELADY: Right.
THE CLERK: And what amount of damages, if any, do you assess to Mr. and Mrs. Aldridge for loss of consortium?
THE FORELADY: Excuse me. I thought you just wanted me to give you a separate total for the wages and damages. I didn't add the suffering and pain. Do you want me to give you a total for the suffering and pain?
THE CLERK: There was to be a total--
THE COURT: Yes, a total--
THE FORELADY: Oh. Okay.
THE COURT: --for all damages to Mr. Aldridge.
THE FORELADY: Okay. $196,800.
THE COURT: One hundred ninety-six thousand--
THE FORELADY: Thousand, eight hundred.
THE COURT: --eight hundred dollars?
THE FORELADY: Right.
(Continued)

4 (Continued)

THE CLERK: That's to Mr. Aldridge individually?
THE FORELADY: Right.
THE CLERK: And as to Mr. and Mrs. Aldridge for the loss of consortium what amount of damages, if any, do you assess?
THE FORELADY: $25,000.
THE CLERK: Do you want the jury polled?
MR. PAPPAS: Please.

* * * *

The jury's figure of $161,800. was the amount requested by the plaintiffs in closing argument. That figure, rounded to the nearest hundred dollars was comprised of the following:

a. Stipulated medical expenses (paid by the Railroad to which they are entitled to a credit)$ 2,058.52

b. Stipulated rate of pay as of January 3, 1981 was at the rate of $8,7133 per hour. Using this figure as a wage loss from January 3, 1981 to date of trial, August 8, 1983 $ 45,625.81

c. Future wage loss projected on the basis of the stipulated hourly rate of $8.7133 was $16,306.00 a year projected to age 65 (7 years)	114.142.00
TOTAL	$161,826.33

Accordingly, the amount of damages for future wage loss that normally would be subjected to revaluation to reflect "societal forces" is $159,741.48 ($161,800. - $2058.52). Jones & Laughlin Steel Corp. v. Pfeifer, supra, 103 S. Ct. at 2551 n.22 (wages subject to discount figured from date of accident to date of retirement). And the plaintiff would be entitled to prejudgment interest on $45,625.81 of that award. Id.

In answering B & O's argument that it was error to omit the instruction on

discounting, the plaintiffs assert that B & O waived any claim of error by not requesting the instruction, not objecting to its omission, or not otherwise preserving the issue. Although the transcript does not show clearly that a request was made or omission objected to, it adequately demonstrates that the issue was preserved. After the Court denied B & O's motion for a mistrial, counsel for B & O stated: "You're not going to say anything about present [value]?" The Court replied, "Oh, no. I don't think most people have the faintest idea what we would even be talking about." The Court understood this to be a request for the instruction, and denied that request. Moreover, the Court was

aware that B & O desired an instruction on the discount, and the Court considered that desire and the propriety of such an instruction before deciding not to give it. In that light, this Court is of the opinion that B & O has not waived its objection to the lack of an instruction on present value.

Even though the issue was preserved, the Court finds that, on the facts of this case, B & O was not entitled to the instruction. Neither party had introduced any evidence on discounting damages to present value. Under those circumstances, instructing the jury on discounting would be confusing and improper. The Ninth Circuit has recently addressed this precise issue in Alma v. Manufacturers

Hanover Trust Co., 684 F.2d 622 (9th Cir. 1982). Alma involved a suit under the Jones Act, in which the defendant claimed on appeal that the trial court erred by not discounting the award to present value even though no evidence on that subject had been produced. In addressing this contention, the Ninth Circuit stated:

> In either a jury or a non-jury trial, the damage evidence presented may lead to one of three computations. Where, as here, neither party provides competent evidence of the inflation rate or the discount rate, the district court must make a lump sum award that is not adjusted for either factor. We specifically reject Maritime's claim that the trial judge is obligated to determine an appropriate discount rate without evidence to reach that determination. The rate is an evidentiary issue, and thus it is the responsibility of the parties to produce evidence of the rate that is appropriate.

Chesapeake & Ohio Railway Company v. Kelly, 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 ,.Ed. 1117 (1916).

Id. at 626. The court then went on to state that it was the responsibility of the plaintiff to introduce evidence on the inflation rate, and of the defendant to introduce evidence on the discount rate. Thus, under Alma, B & O was not entitled to an instruction on the discount, because it had not offered any evidence on the point.

The Court is persuaded that the Alma approach makes excellent sense. Adjusting damages to reflect societal forces is a matter for the trier of fact. Jones & Laughlin Steel Corp. v. Pfeifer, supra, 103 S.Ct. at 2551. Calculating a proper award of future earnings is complicated, involving the

use of an appropriate inflation rate, discount rate, and income tax rate. Even with the aid of evidence, the procedure is confusion. Without evidence, arriving at a correct figure is probably an impossible task for even the most sophisticated jury. Thus, without some evidence of the correct factors to be considered, instructing the jury that they may adjust damages can only serve to confuse, with little hope of leading it to the correct result. Accordingly, without any competent evidence to guide the jury, an instruction on adjusting damages is not appropriate.

Finally, in a letter dated April 5, 1984, B & O contended that damages should have been calculated to

reflect Mr. Aldridge's after-tax wages instead of the gross wages used by the jury. Undoubtedly, this would have been the correct procedure, had evidence on Mr. Aldridge's after-tax wages been introduced. See Norfolk & Western Railway No. v. Liepelt, 444 U.S. 490 (1980) (error in failing to admit the testimony of defendant's expert on the plaintiff's tax liability; damages for future wage loss to be calculated on after-tax rather than gross income). But in the absence of evidence on the effect of income taxes, a jury cannot be required to applu the tax factor, just as it cannot be required to apply inflation and discount rates in the absence of that evidence. In any event, B & O's request for a new trial on this

basis is belated; there was no requested instruction on this factor, nor was it timely raised in any post-judgment motion.

Accordingly, B & O's motion for a new trial on the ground that the Court erred in not giving an instruction on discounting future wage loss to present value--as to which ground the Court reserved decision in its Order dated January 10, 1984--will be denied. A separate Order will be entered to confirm this ruling.

/s/
WALTER E. BLACK, JR.
United States District Judge

Dated: April 25, 1984.